United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

nc. 8-26-75

AND APPENDIX
BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

75-7433

ELI RAITPORT,

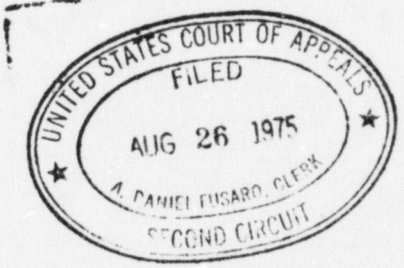
Appellant,

-against-

COMMERCIAL BANKS LOCATED WITHI
THIS DISTRICT AS A CLASS AND
FOUNDATIONS OPERATING INVESTMENT
PORTFOLIOS AND MANAGED DIRECTLY
OR INDIRECTLY BY THE ABOVE SAID
BANKS AS A CLASS,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK
DISMISSING ACTION ON GROUNDS OF
COLLATORAL ESTOPPEL



ELI RAITPORT
1807 Mower Street
Philadelphia, PA 19152

C.A. No. 75 Civ. 66

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PRELIMINARY STATEMENT

This is an appeal by the plaintiff Eli Raitport to the U.S. Court of Appeals for the Second Circuit of Appeals for the Second Circuit, from final order pursuant to statute 28USC1291 of the U.S. District Court for S.D.N.Y. of April 1,1975 by Honorable Henry F. Werker granting defendants summary judgment on grounds of collatoral estoppel.

JURISDICTION OF COURT BELOW alleged pursuant to statute 15USC 1 and 15USC 2 , 15USC 13 and Law based on diversity of citizenship. Appellant respectfully requests to reverse the judgment as being erroneous as a matter of Law.

STATEMENTS OF ISSUES PRESENTED FOR REVIEW

ISSUE #1 Whether the court below pursuant to Rule 52 FRCP erred, failing to find the facts and state separately why the case is dismissed, insofar as the claim pursuant to Law is concerned.

ISSUE #2 Whether pursuant to Rule 52FRCP the court below erred failing to find the facts specially and state separately whether the judgment invoked as collatoral estoppel was within jurisdiction of that court and valid.

ISSUE #3 Whether the court below erred holding that consolidation of the case at bar and the case against its subsidiary was proper.

ISSUE #4 Whether the court below erred pursuant to Rule 52 FRCP failing to find the facts and state separately whether plaintiff's failure to join the banks in the previous action was purportly a delatory action.

STATEMENT OF THE CASE

Appellant-Plaintiff ("Plaintiff") an entrepreneur-inventor has filed a complaint against a class of all commercial banks in the Southern District of New York and foundation operating investment portfolios managed by these banks. First National City Bank (Citibank") is named as the representative party of the class of defendants' banks and foundations.

Plaintiff alleges six (6) statutory liabilities based upon 15USC 1 and 2; 15USC(13); and two liabilities at Law. Compensation of damages over $2,000,000,000 (Two billion) trebled is demanded.

Prior to answering the complaint defendants moved for summary judgement on grounds of res judicata. The court below by Honorable Henry F. Werker granted summary judgment to all defendants and dismissed the action by a Memorandum Decision of April 2, 1975.

The district court setforth collatoral estoppel as the grounds for dismissal complaint as to the statutory liabilities. However, district court remained silent insofar as grounds for dismissal of complaint at Law. Plaintiff believes that this is a violation of Rule 52(a) FRCP

Further plaintiff contests validity of the judgment invoked as collatoral estoppel; and contests applicability of doctrine of collatoral estoppel in suit at bar in defense for Citibank, and more so for other banks.

Plaintiff requests reversal of the judgment.

DESCRIPTION OF PARTIES

Plaintiff is an entrepreneur-inventor for many years devoted hi efforts and resources to resolve the chronic problems of the society; inflation, safety and shortage of natural resources.

Guided by simple rules and rationals of economy plaintiff organized several groups of engineers and scientists to work on several projects to fulfill above goals. Accumulatively over one hundred (100) engineers and scientists had been actively engaged in the work organized by plaintiff and close to $2,000,000 had been invested in the many projects.

Four of its patents and a filing with the Security Exchange Commission describing some of its entrepreneurial activities has been admitted in evidence in case of Eli Raitport v. Ballard, et al., C.A. 74-89 (E.D.PA).

U.S. District Court (E.D.PA) by Honorable Alfred L. Luongo has noticed about this plaintiff as follows:

> "Raitport is a Pennsylvania resident. He is president of Scientronic Corporation, a Pennsylvania corporation with its office in Philadelphia. He has a long-standing interest in reducing obstacles encountered by small entrepreneurs in the research and development

area, particularly the obstacle posed by lack of capital. His concern dovetails with his professional interests. Either independently or through Scientronic, he has authored several papers designed to counsel small investors or entrepreneurs on pitfalls commonly encountered when investing or seeking capital. He also claims to have invented or designed plans to invent several devices, including an energy absorbing mechanism for cars, a heating and cooling system for small dwellings, and improved switches for sprinkler systems. For several years, Raitport had been writing to government officials making the case for a program generally like ETIP, which concerns itself with the problems of small entrepreneurs involved in R & D.

In July 1972, shortly after the inception of ETIP, Raitport submitted a proposal to the agency in which he suggested that ETIP fund a United States Bank for National Economic Development to finance small entrepreneurs seeking to provide at lower cost products used in large volume in this country."* Eli Raitport v. NBS et al., 378 F. Supp. 380 (E.D. PA 1974)

*Footnote: "Along with the Bank proposal Raitport also submitted to ETIP plans for his various inventions. ETIP immediately refused to consider the merits of these engineering devices, on the ground that they did not fall within the agency's purview. The agency encouraged Raitport to submit these devices to other government abencies including the National Science Foundation and the Enviromental Protection Agency. Raitport does not challenge ETIP's conclusions with respect to his engineering invetions, and only the Bank proposal is at issue in this action."

Further on p. 14 supra Honorable Alfred L. Luongo noted:

"There is no denying Raitport's sincereity in this matter."

U. S. District Court (S.D.N.Y.) by Honorable Charles L. Brieant, Jr. in his Memorandum Opinion of May 21, 1975 in Eli Raitport v. General Electric et al 5CCH Trade Reg. Rep. 60, 3858 (S.D.N.Y. 1975), noted that this litigant is a capable and intelligent man.

Judge Huyett, III in his Memorandum and Order of July 17, 1975 in Eli Raitport v. Bank and Trust Company of Old York Road et al., 74 Civ. 447 (E.D. Pa.) p. 2, ranked this plaintiff's arguments as ingenious.

For several years Plaintiff continuously warned legislation about the oncoming recession and suggested remedies to prevent it. In mid of 1972, while people were highly emphatuated with ex-president Mr. Richard M. Nixon, Plaintiff recognized the corruption in the administration and filed a suit on behalf of directors and stockholders of Scientronic Corporation alleging that Mr. Richard Nixon and several other high officers conspiring and corroborating to restrain trade. Scientronic v. Charles Burke, et al., 72-1420 (E.D. PA.).

Defendants directly and indirectly undermined and destroyed Plaintiff's project, prevented him from proceeding into production, because he would infringe the interest of the defendants in their endeavors to monopolize banking industry. Consequently, Plaintiff suffered loss of profit of a very substantial amount. Defendants paralyzed all Plaintiff's assets that he became penniless, figuratively speaking.

DEFENDANTS, are banks and foundations who on its face breache the duty to the people. It is elementary that in a complex society, subjects of the people owe a duty in commission as well as in omission to the fellow men and the society at whole at Law.

This law has been well expanded into obligation to provide subsistance for the fellow men; education for his children; medical care, safe merchandise only to be sold to his fellow men; a car to be provided with safety features; safe working conditions for his fellow man and etc. It has been well recognized that a professional owes a duty at Law to his fellow man to provide quality service--suitable necessarily for prosperity and perpetuation of the society under the circumstances.

It is uncontrovertible that banks also owe a duty to the people which would serve the prosperity and perpetuation of the society.

The purpose of the banks is to expand commerce and industry to serve the people. That necessarily includes creation of new firms, because that is the only way to prevent manopolization--a recognized evil at Law, Standard Oil v. United States, 221 U.S. 1; and to assure a prosperous economy, achievable only through work of inventors-entrepreneurs.* Consequently, the defendants herein

* It is elementary economics that peoples'

owe a duty to the people to coor-rate with inventors-entrepreneurs.

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* Footnote continued from page 6

true incentive to produce is based on desire for continuous progress which is measured by envy and rivalry (to have today more possessions and services than yesterday; and to have more than the next fellow.), as the statement:

> "I considered all toil and all achievement and saw that it comes from rivalry between Man and man." Ecclesiastes 4, 4.

Usually it is expressed in demand for higher wages and profit; but unless (GNP) Gross National Product is increased in real terms, higher wages solely causes more money in circulation; that allocates more money for the same products and services without satisfying the real desires of the people, and pushing yet for greater demands. People providing social services, (government, education and etc.) are also striving for betterment and to compensate for deflation of their salaries due to salary increases in industry. Therefore, pushing up prices further more via higher taxes distributed over the same amount of G.N.P.

Consequently, inflation runs over the increase of wages, and then the purchasing power decreases causing slump in buying. Then businesses, while still trying to increase profit, (to compensate for inflation and natural desire for achievement) cut costs, thus reducing manpower and production, worsening and perpetuating the recession into a depression.

Thus, the cure and prevention of economic downturn is continuous increase of productivity of the people which constitutes increase in GNP. That is traditionally accomplished by entrepreneur-inventors. While productivity of average people is somewhat constant.

Thus Thomas Edison substantially increased productivity of human beings in lighting and heating, and general energy converting industries; Henry Ford, Sr. increased the rate of human productivity in the transportation industry; Dr. Lyn increased the rate of human productivity in the reproduction industry and so on.

Prosperity was achieved not only for the industries directly involved, but the entire nation and the world as

In the complaint has been setforth another theory of defendants' duty at Law based on principle of consideration. Both are correct.

Defendants' breach of above duty caused several misery to people: crimes, inflation, recession. This plaintiff has conducted research of the causes generating crimes and determined that a very substantial amount of crimes are caused by

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*Footnote cont'd. From pg. 7

a whole, by releasing manpower for its use in other industries. A typical example how entrepreneur-inventors increase productivity of men and provide the "fuel" for perpetuation of a healthy and prosperous society, can be seen from computers.

Computers have enormously increased human productivity in the field of calculation and data processing in general, therefore, releasing millions of people from those chores, without decreasing the supply of that "product"; and, consequently, not creating a shortage or internal pressure for higher prices for data processing. In other words, the cost of data processing had deflated.

The millions of people released for chores in other industries could increase their productivity there (even without great innovations) in order to keep off inflationary pressure; that is, to provide for ever increasing demand without generation the opportunity for undue demands of greater profit and wages prompted solely by "demand-supply" unbalance.

The computers also helped to satisfy the above said normal and justified demands of greater profit and wages; the demands which generate the basic incentive for social-economic machinery of the free world; because the increased productivity of human beings in the data processing field compensated for lack of such increment in other industries. Since in a final product data processing constitutes a part of the cost; it's deflation compensated for inflation of other portions of a product. Consequently, entrepreneur-inventors are supplying the "fuel" for perpetual motion of a healthy economy.

"search for excitement" (contrast of being bored). The phenomena of need of excitement is similar to the need of progress setforth above, pgs. 7 and 8, footnote That need is proportional to leisure time available. Until about 10years ago, parallel with the rise of leisure time new inventions in entertainment field provided the "excitement"; thus invention of movies, then radio, telephone, television, color television, snow mobiles, portable radios and others; the apparatus as such provided the "excitement". Since the grip of restrain of trade tihgtened up, no new inventions come to the market in entertainment field as well, the "search for excitement" followed subconsciously directing the people toward things known to them i.e. sex or horror, perhaps on television screen or otherwise.

Consequently it is alleged, "figuratively speaking"* that the blood of the victims of the crimes is on the garb of defendants herein.

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* "Figuratively" is in quotes, because through mutual stockholding in bank and insurance companies, the bank literally profiteering from crimes, via increased insurance business from population risingly frightened of crimes.

Analogizing white-gloved bureaucrats to murderers for breach of duty, has a strong precedence in the Bible. Isaiah compared judges who pervert justice to murderers, Isaiah 1,15-17: (from verse 17 it is apparent that the address is to judges):

> "When you spread forth your hands, I will hide my eyes from you; even though you make many prayers, I will not listen: <u>your hands are full</u> of blood. Wash yourselves; make yourself clean;

This plaintiff established that the high unemployment, especially among teenagers, substantially reduced popularity of work; consequently reducing its prestige to the extent that often among teenagers prestige of stealing, burglaring and etc. is equal or higher than prestige of working. That is an idiocracy which will grow in, perhaps subconsciously into their adulthood, making a horrifying, perpetuating and irreparable wound to the entire society.

These are the contributions of the defendants to the society.

HISTORY OF THE CASE

(1) For several years plaintiff's toil is in organizing companies for development and making of such products which would supply the fuel for a steady, prosperious economy. (see note above p. 7-8)

(2) Many times plaintiff solicited financing of his firms from defendants, but every and each time defendants refused

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*Footnote cont'd from pg. 9

remove the evil of your doings from before my eyes; cease to do evil, learn to do good; <u>seek justice, correct oppression</u>; defend the fatherless, plead for the widow."

Only courts can be meaningfully directed to seek justice and correct oppression. (See commentaries by Rashi and Aban Ezra)

Similarly in Deuteronomy 21, 1-6, officers and judges are compared and made accomplices to murderers for non-feasance in office and/or perversion of justice. And similarly the Psalmist sang in Psalm 94, 6:

to deal with him for establishment of new companies. Moreover, defendants deceived and defrauded plaintiff in attempt to drain the funds from him and to prevent other private and governmental sources of capital to deal with plaintiff. Allegedly some defendants have set up subsidiaries solely for the purpose of fraud.

On January 28, 1974 plaintiff filed a complaint against four (4) small business investment companies---firms with 75% of Federal financing established by Act of Congress for the purpose to spur competition in industry 15 USC 631. Two of the SBIC, are wholly owned subsidiaries of banks. The plaintiff alleged violations of several statutes and inter alia violations of 15 USC 1 and 15 USC 2, 15 USC 631, 15 USC 681, 15 USC 1026 (1970) and Law.

(3) On January 10, 1975 summary judgement has been granted to all defendants for lack of evidence that a conspiracy was in effect, and the complaint was dismissed insofar as based on other statutes, and not considered as to Law.

(4) On January 8, 1975, Plaintiff filed the complaint in instant action against seventy (70) banks and presumably several hundred foundations alleging violation of 15 USC 1 and 2 in refusal to deal with plaintiff, and in Law, in commission and omission, based on diversity of citizenship naming First National City Bank of N.Y. as representative of the class. Plaintiff did not combine the two actions

because SBIC, although two of them are subsidiaries of the two banks, they are separate businesses and governed by distinctly separate policies, and method of doing business; and plaintiff believes that inasmuch as the practical standpoint of fact finding, consolidation of SBIC and bank will contribute confusion only.

(5) In addition to statutory liability, plaintiff distinctly claimed defendat's liability at Law in omission arising from theory of mutuality of consideration setforth in complaint paragraph 7, 8, 9, 12 and 24; and in commission arising out of fraud and deception setforth in complaint paragraphs 16, 17, 18 and 24.

(6) The Court below acting through Judge Werker dismissed the complaint on April 2, 1975 on the ground of collattoral estoppel. However, in its Opinion the district court considered the claims of statutory liability only. Perhaps inadvertantly it railed to consider the claims at Law.

(7) On April 21, 1975, Plaintiff filed a Motion for reconsideration on grounds that:

> (1) The question at Law was not adjudicated at all in previous case;
>
> (2) Consolidation of the cases, if permissible, were only discretional matters.

In alternative, plaintiff requested leave to amend the complaint to sue Chemical Bank of New York as representative of the class rather than First National City Bank. This Motion was denied without opinion on May 29, 1975.

(8) Plaintiff thought perhaps it was an error of the Clerk of the court to dismiss the action as to all defendants, and on April 17, 1975 filed a Motion to direct the Clerk of the court to correct the error; but this Motion was denied on May 29, 1975 as well.

(9) On June 25, Plaintiff mailed via certified mail Notice of Appeal and Motion for Leave to Proceed Pursuant to 28 USC 1915. The documents were received by the Clerk of the United States District Court (S.D.N.Y.) on June 26, 1975, (see Exhibit A annexed to Appellant's Contra-Affidavit in Opposition to Appellee's Motion to Dismiss). By virtue of unexplained mystery in the office of the Clerk, the Notice was not docketed until July 8, 1975.

(10) The Motion was granted by the district court on July 8, 1975 and this appeal followed.

ARGUMENT

ISSUE I. WHETHER THE COURT BELOW PURSUANT TO RULE 52FRCP, ERRED FAILING TO FIND THE FACTS AND STATE SEPARATELY WHY THE CASE IS DISMISSED, INSOFAR AS THE CLAIM PURSUANT TO LAW IS CONCERNED.

1. The District Court emphatically violated Rule 52 (a) * FRCP. In its Opinion Decision the district court did not mention the issues at Law at all.

2. The district court had to try and adjudicate the case upon facts: Whether the same claims had been previously adjudicated or not; or at least whether the litigant against whom collatoral estoppel is invoked had a full and fair opportunity to litigate the issue prior to this litigation.

> "...the thing to be litigated was actually litigated in a previous suit, final judgment entered, and the party against whom the doctrine is to be invoked had full opportunity to litigate the matter and did actually litigate it." (emphasis supplied) United States v. United Airliner, Inc., 216 F. Supp. 709 at page 226 (E. D. Wash. Nov. 1962) aff'd sub nom United Air Lines v. Weiner, 335 F. 2d 379 (9th Cir.) cert. denied, 379 U. S. 951 (1964).

3. Out of necessity the law must be that consideration of application of collatoral estoppel is trial on the facts whether the claims have been or could be actually adjudicated, because absence of this fact the plaintiff has

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* In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58;" Rule 52(a) FRCP.

been pushed out from Court; his Constitutional rights guaranteed by Amendment's V and VII are violated. That is impermissible

ISSUE II. WHETHER PURSUANT TO RULE 52 FRCP THE COURT BELOW ERRED FAILING TO FIND THE FACTS SPECIALLY AND STATE SEPARATELY WHETHER THE JUDGMENT INVOKED AS COLLATORAL ESTOPPEL WAS WITHIN JURISDICTION OF THAT COURT AND VALID.

4. The fact that the judgment invoked as collatoral estoppel is valid must be established. Saylor v. Lindsley, 391 F. 2d 965 (2nd Cir. 1968); This opinion is echoed in Words and Phrases Res judicata

> "Res judicata doctrine is that existing final judgment rendered upon merits, without fraud or collusion, by court of competent jurisdiction, is conclusive of rights, questions, and facts in issue, as to the parties and their privies, in all other actions in the same or any other judicial tribunal of concurrent jurisdiction." Walhow v. Finley, 372 S.W. 2d 390, 393, 237 Ark. 106; Oldham v. McRoberts, 237 N.Y.S. 2d 937, 947.

In case at bar plaintiff asserted that district court granting summary judgment in case invoked as collatoral estoppel acted without jurisdiction. (Plaintiff's Affidavit sworn to on February 23, 1975, paragraph 4).

4. By rule of Supreme Court the district court was bound to make a determination whether judgement invoked as collatoral estoppel was valid. Deposit Bank v. Frankford, 191 U.S. 499.

> Although neither judges, the parties, nor the adversary system performs perfectly in all cases, the requirement of determining whether the party against whom an estoppel is asserted had a full

> and fair opportunity to litigate is a most signigicant safeguard." Blonder-Tongue v. University of Illinois Foundation, 402 U. S. 313 (1971) at pages 328-329.

If conflict as to facts existed than a summary judgment may not be granted. Bros. Inc., v. W. E. Grace Manufacturing Co., et al, 261 F. 2d 428 (5 cir. 1958). Zenith Vinyl Fabrics Corporation v. Ford Motor Co., 357 F. Supp. 133 (1973). The Rule 56(c) FRCP specifically provides that summary judgment may be granted only if there is no conflict as to material facts:

> "The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact that the moving party is entitled to a judgment as a matter of law."

The court is duty bound to establish that there is no material facts in dispute. Then pursuant to Rule 52 FRCP the district court had specifically to find the facts.

ISSUE III. WHETHER THE COURT BELOW ERRED HOLDING THAT CONSOLIDATION OF THE CASE AT BAR AND THE CASE AGAINST ITS SUBSIDIARY WAS PROPER.

6. The Rule 1 FRCP promulgates that:

> "They shall be construed to secure the just, speedy, and inexpensive determination of every action."

Consequently, such joinder which will confuse the case is not permissible. The claim against the subsidiaries involves $314,000,000 damages (before trebling) with several complicated issues of law and facts inter alia new to the courts. There is no case to be found ever adjudicated in U. S.

the duty of a company licensed under Small Business Investment Act, 15 USC 681 and seq., to an entrepreneur-inventor, nor it has been ever adjudicated the duty of such a company pursuant to Economy Stabilization Act, 15 USC 1026, nor at Law such questions ever been decided the duty of SBIC toward entrepreneur-inventors.

7. In case at bar, the claim involves banks and foundations, damages over $2,000,000,000 (before trebling); again with several complicated issues in fact and in law, interalia, new to the courts. The structure, the purpose, the operation, the policy of SBICs' and banks and foundations are distinct. The liability at Law could not be applied the same way to banks as to SBIC's. Therefore, the joinder would cause only confusion to the courts, rather than justice! Conspiracy is only one claim out of eight!

8. Is it to say that all suits involving conspiracy should be joined together? Or all cases of restrain of trade should be joined together? Neither the district court, nor the defendants suggest that common set of facts or particularly same question of Law has been involved. In order to constitute a question in law, conspiracy must involve a statutory violation of some kind. Since the question of statutory violation is distinct for each group of defendants joinder is not permissible. Moore, F. P. 20.06. In Cohen v. District of Columbia National Bank (D. D. C. 1972) 59 FRD 84, 16 FR Ser. 2d 848, the court held that

other banks could not be joined as defendants because of substantial variation in loan policies and procedures, therefore, test of Rule 20(a) was not met and several other cases were cited there. See also Standard Industries v. Mobil Oil, 475 F. 2d 220.

ISSUE IV. WHETHER THE COURT BELOW ERRED PURSUANT TO RULE 52FRCP FAILING TO FIND THE FACTS AND STATE SEPARATELY WHETHER PLAINTIFF'S FAILURE TO JOIN THE BANKS IN THE PREVIOUS ACTION WAS PURPORTLY A DEBATORY ACTION.

9. Out of necessity the interpretation of the rule of this Circuit promulgated in Saylor v. Lindsley, supra, must be in harmony with the rule utterate and reiterated by Supreme Court that judicial power does not extend over decisions made by private companies in their course of business absent abuse of discretion or circumvention of the law. United States v. Colgate & Co., 250 U. S. 300 (1919); Times-Picayune Publishing Co. v. United States, 345 U. S. 594 (1953); United States v. Trans-Missouri Freight Association, 166 U. S. 290.

There is a long list of lower courts decisions which have emphasized that a person is at right to make decisions right or wrong save presence of malice. Ark Dental Supply Co. v. Cavitron Corp., 461 F. 2d 1993 (3d Cir. 1972); Instant Delivery Corp. v. City Stores Co., 284 F. Supp. 941 (E. D. Pa. 1968); Peerless Dental Supply Co. v. Weber Dental Mfg. Co. 283 F. Supp. 288 (E.D. Pa. 1968); Shawver & Son, Inc. v. Oklahoma Gas & Electric Co., 463 F. 2d 204 (10th Cir. 1972);

Bushie v. Stenocord Corp., 460 F. 2d 116 (9th Cir. 1972); Colorado Pump & Supply Co. v. Febco Inc., 472 F. 2d 637 (10th Cir. 1973) cert denied, 411 U. S. 987 (1973); Weather Wise Co. v. Aeroquip Corp., 468 F. 2d 716 (5th Cir. 1972), cert. denied, 93 S. Ct. 1505 (1973); Zenith Vinyl Fabrics Corp. v. Ford Motor Co., 357 F. Supp. 133 (E.D. Mich. 1973).

In Miller v. A. T. & T. 344 F. Supp. 344 (E.D. Pa. 1972), the court said:

> "A court may not substitute its own judgment for that of a corporation judgment absent a showing that the officers or directors have acted unreasonably or breached their fiduciary duty. This is known as the Sound Business Judgment Rule, Ash v. International Business Machines, Inc. 236 F. Supp. 218 (E.D. Pa. 1964)" at page 349.

10. A case is the litigants private business. If he can make out a rational that joinder is improper then absence of failure to comply with a specific court order or otherwise showing abuse of discretion court may not substitute its decision for the litigants.

11. Therefore, the interpretation of Rule promulgated in Saylor v. Lindsley, supra, is out of necessity that res judicata may be invoked if the litigant cannot make a rational why he did not raise the question in the previous litigations; or abuse of discretion may be shown otherwise in failure to joint defendants at first opportunity.

Democracy has been past if the courts would utter one

set of rules for the rich and another for the poor! Therefore, it was imperative for the district specifically find that instant plaintiff uncontrovertably could have raised the issues against banks at the first litigation against the SBICs, because absence that plaintiff's constitutional right of Due Process is abrogated.

CONCLUSION

In suit at bar violation of plaintiff's constitutional rights and civil rights emphatically took place!

In fact, plaintiff did not get a fair trial;

in fact the allegations were not considered by a court of law;

in fact the evidence did not come before the court. Plaintiff's constitutional rights guaranteed by Amendment V and by Amendment VII were violated! Our society must fail if outright Constitutional violations allowed to be garbed in fancy slogan - collatoral estoppel!

It is plain pushing out from court. Defendants did not submit a vestige of evidence that the question at Law has been ever considered by any court, nor could it submit such evidence.

District Court's violation of FRCP is on its face. It cannot be controverted. It should be emphasized that at bar is not just a simple overlook or procedural error; rather subject violation of rules of FRCP depicts that the

spine of Due Process has been broken; the basic requirement of the principle of justice to inquire into the allegations, defenses and law has been abrogated.

It is elementary that Rule 52(a)FRCP is not meant to waste court's time but to circumvent subconscieously arbitrary decision - when the court believes that it thoroughly dealt with the question, but in reality it did not. Then comes the Rule 52(a) FRCP and puts the court through a task of finding the facts specifically, wherefore, should there have been subconscious failure of diligent and studious piercing of the issues the judge would become aware of it before signing the order.

This precaution is a must, because Constitutional guarantee of V and VII amendments, the backbone of the democratic society is at stake. The agjudication in instant case was not on the merits, but on a whim. CONSEQUENTLY, in case at bar plaintiff's Constitutional rights have been abrogated, rules of FRCP have been violated. Since it has been a long standing in jurisprudence that litigants may be sanctioned for violation of the Rules of Civil Procedure. Rule 11, Rule 37, Rule 55, Rule 56, FRCP; in case at bar sanctioning is very appropriate. Plaintiff has suffered uncalculable and unsurmountable losses; he suffered loss of many years of his life as well; that cannot be reinstated. Plaintiff has already spent almost two years litigating this and related cases incurring large expenses only

because perhaps inadvertantly the Rules are violated.

WHEREFORE, plaintiff respectfully submits that justice requires that the summary judgment in case at bar should be reversed.

RESPECTFULLY SUBMITTED,

Eli Raitport

ELI RAITPORT
1807 Mower Street
Philadelphia, Pa., 19152

DATED: August 15, 1975

That plaintiff, Pfizer, Inc., its agents, servants, employees, and attorneys and all persons in active concert and participation with them be and they hereby are, restrained and enjoined for a period of sixty days from the date of this Order, January 20, 1975, or until further order of the Court from:

(a) taking any further steps or actions in the prosecution of or in connection with, or submitting any documents or information in furtherance of, the proceedings now pending before the United States International Trade Commission entitled "In the Matter of Unfair Methods of Competition and Unfair Acts in the Importation and sale of ALPHA-6-DEOXY-5-OXYTETRACYCLINE," Docket No. 337-L-60; and

(b) initiating, prosecuting, or in any way participating in any further proceedings before the United States International Trade Commission in connection with the importation of doxycycline products as such involved in this litigation.

It Is So Ordered.

[¶ 60,278] Eli Raitport v. Commercial Banks Located Within This District as a Class and Foundations Operating, Investment Portfolios and Managed Directly or Indirectly By Above Said Banks as a Class.

U. S. District Court, Southern District of New York. No. 75 Civ. 66 (HFW). Filed April 2, 1975.

Sherman Act

Private Cases—Defenses—Prior Adjudication—Collateral Estoppel—Parent of Defendants in Prior Action.—An inventor could not maintain an antitrust action against a number of institutions by switching adversaries from subsidiary credit corporations in a prior action to the parent of one of them as the representative party of a class of banks and corporations. The doctrine of collateral estoppel precluded the action. The thrust of this action was the same as that of the prior action—one huge conspiracy to prevent plaintiff from manufacturing his inventions. Plaintiff had a full and fair opportunity to litigate the same claims in the prior suit, and could not avoid the results of that suit by merely suing the parent banks and embellishing on his theories. See ¶ 9214.

For plaintiff: Eli Raitport, *pro se*, Philadelphia, Pa. For defendants: Shearman & Sterling, New York, N. Y. (John J. E. Markham, II, of counsel).

Memorandum Decision and Order

WERKER, D. J.: Plaintiff, *pro se*, brings this antitrust treble damage action against a purported class of all commercial banks in this district and all foundations operating investment portfolios managed by these banks. First National City Bank ("Citibank") is named as the representative party of the class of defendant banks and foundations. Prior to answering the complaint, Citibank has moved for summary judgment upon the grounds of *res judicata* based on the opinion of Judge Knapp in *Raitport v. Chase Manhattan Capital Corp., et al.* [1975 TRADE CASES ¶ 60,116], 74 Civ. 462 (S. D. N. Y. January 9, 1975), wherein Judge Knapp granted the summary judgment motions of all defendants in that action including FNCB Capital Corporation, a wholly owned subsidiary of Citibank. For the reasons discussed below, Citibank's motion is granted.

The allegations and theories upon which plaintiff seeks recovery are stated in his complaint as follows:

"(1) Plaintiff alleges that defendants have unlawfully refused to deal with him and restrained him from continuing and entering business as set forth below in violtion of 15 USC 2;

(2) Plaintiff alleges that defendants have conspired to refuse to deal with him in violation of 15 USC 1 & 2.

(3) Plaintiff alleges that defendants have conspired to destroy investment banking industry for the goal of monopolizing the commercial banking industry in violation of 15 USC 1 & 2.

(4) Plaintiff alleges that defendants conspired on behalf of automotive, appliances, energy producting and food producing industries to monopolize in violation of 15 USC 1 & 2.

(5) Plaintiff alleges that defendants discriminate without justification against new manufacturing businesses in violation of 15 USC 13.

(6) Plaintiff alleges that defendants discriminate without justification against small manufacturing companies competing or attempting to compete against

energy producing, automotive, appliances and container industries in violation of 15 USC 13."

The plaintiff then proceeds to describe himself as an "inventor-entrepreneur" whose time and efforts are devoted to fighting such problems as inflation, safety and energy shortage. After describing the roles of "inventor-entrepreneurs" and commercial and investment banks in the American economic system, the plaintiff lists thirty-six (36) lines of products which would be manufactured by companies that he is attempting to organize and finance. According to the complaint, the defendants are involved in a "malicious conspiracy" to monopolize the automotive, major appliance, container manufacturing and energy producing industries. As part of this alleged conspiracy, the defendant banks and foundations have allegedly conspired and implemented policies to limit the financing of new companies, including those organized by the plaintiff, which would seek to be competitors of established companies in the automotive, appliance, container and energy producing industries. Because of the alleged conspiratorial conduct on the part of the defendants, the plaintiff claims that he has been damaged in excess of the amount of two billion ($2,000,000,000) dollars and asks that that amount be trebled, and for interests and costs.

In the litigation before Judge Knapp, the plaintiff sued four lending institutions licensed by the Small Business Administration as Small Business Investment Corporations. His complaint alleged violations of the Small Business Act, 15 U. S. C. §§ 631 *et seq*., the Small Business Investment Act of 1958, as amended, 15 U. S. C. §§ 681 *et seq*., the Economic Stabilization Act, 12 U. S. C. § 1904 (1973 Supp.), the Sherman Act, 15 U. S. C. §§ 1 *et seq*., and the Civil Rights Act, 42 U. S. C. § 1985. Judge Knapp concluded that none of the theories except the antitrust theory presented a claim upon which relief could be granted. Slip Opinion at 4. As part of his antitrust theory in that case the plaintiff alleged that the defendants were engaged in an "unscrupulous conspiracy to help monopolize certain industries, i. e., to preclude establishment of new firms in [the] automotive field, in [the] appliance field, and [the] energy producing or energy conservation fields." At page 7 of his opinion Judge Knapp concluded that:

> Were the plaintiff able to show by competent evidence that the defendants were in fact "instrumental [in preventing] other financial institution [sic] from helping plaintiff", for the purpose of "restrain[ing] plaintiff from entering [the] trade of his choice", and that the defendants were "engaged in an unscrupulous conspiracy to . . . monopolize certain industries . . . to preclude establishment of new firms in [the] automotive, . . . appliance . . . and energy producing or energy conservation fields", he would be entitled to relief under 15 U. S. C. § 15. (footnote omitted)

After extensive discovery by the plaintiff Judge Knapp found that plaintiff was unable to produce any evidence of conspiracy save for his assumption that the only explanation for the refusal to finance his companies must be the existence of an "unscrupulous" conspiracy. At most, plaintiff was able to show parallel business behavior. As a consequence, Judge Knapp granted summary judgment to all of the defendants.

Citibank's argues that all of the claims made by the plaintiff in this action were fully adjudicated in the prior action before Judge Knapp, and thus the doctrine of *res judicata* bars this action. See *Saylor v. Lindsley*, 391 F. 2d 965 (2d Cir. 1968). However, Citibank admits that it was not a party to the first action. Aside from the basic fact that one of the defendants in the prior action was a wholly owned subsidiary of Citibank, no other argument or authority is cited to show that Citibank has met the privity requirements necessary for the application of strict *res judicata* principles. See generally, 1B J. Moore, Federal Practice ¶¶ 0.411[1] and [10] (2d ed. 1974). Compare Note, the Impact of Defensive and Offensive Assertion of Collateral Estoppel By A Nonparty, 35 Geo. Wash. L. Rev. 1010, 1022 n. 96 (1967).

Although invoked under the broad rubric of *res judicata*, Citibank's argument calls for application of the doctrine of collateral estoppel. In *Lawlor v. National Screen Service* [1955 TRADE CASES ¶ 68,061], 349 U. S. 322, 326 (1955), the Supreme Court noted the distinctions between *res judicata* and collateral estoppel:

> "[U]nder the doctrine of *res judicata*, a judgment 'on the merits' in a prior suit involving the same parties or their privies bars a second suit based on the same cause of action. Under the doctrine of collateral estoppel, on the other hand, such a judgment precludes relitigation of issues actually litigated and determined in the prior suit, regardless of whether it

was based on the same cause of action as the second suit."[1]

Undoubtedly, Judge Knapp's decision was a final judgment on the merits. Plaintiff was given a full and fair opportunity to prove his claims and when he failed to do so summary judgment was granted to the defendants. The granting of such a motion is a final adjudication on the merits. See Moore, *supra* at ¶ 0.409[1] and n. 26. Although it is not clear whether plaintiff has filed a timely notice of appeal from Judge Knapp's decision,[2] pendency of an appeal does not detract from the finality of the judgment. See *Huron Holding Corp. v. Lincoln Mine Operating Co.*, 312 U. S. 183, 189 (1941); Moore, *supra* at ¶ 0.416. 3]. Moreover, the fact that Citibank was not a party to the first action does not necessarily prevent it from asserting collateral estoppel since the requirement of mutuality has been liberalized. See *Zdanok v. Glidden Co.*, 327 F. 2d 944 (2d Cir. 1964); *Blonder-Tongue Laboratories Inc. v. University of Illinois Foundation* [1971 TRADE CASES ¶ 73,565], 402 U. S. 313 (1971).

The critical factor to be determined is whether the issues raised in this action were actually litigated and determined in the prior action. As discussed *supra* the only possible theory of recovery alleged in the prior suit was the antitrust claim of an "unscrupulous conspiracy" to monopolize certain industries and refusals to finance the plaintiff's businesses. These very same allegations form the basis for plaintiff's complaint in this action.[3] Again a conspiracy to monopolize the same industries coupled with refusals to deal and discrimination against the plaintiff and other new manufacturing businesses is alleged. The core of both complaints is that over a period of years the plaintiff has asked the defendants in this action and the prior action to finance firms organized by the plaintiff, and that every defendant has refused to provide financing. In the prior action after plaintiff's failure to produce any evidence of a conspiracy, Judge Knapp concluded at p. 8 of his opinion that:

> "[a]ll the plaintiff has been able to establish—or even to suggest—is that some of the defendants have refused to extend credit. Although this may be unpleasant —or even financially disastrous—to plaintiff, it gives him no cause of action under the Sherman Act."

What plaintiff has done in this action is simply to "switch adversaries" from the subsidiary credit corporations in the prior action [to] the parent of one of those corporations as a representative of all banks in this district and foundations with portfolios arranged by those banks. See *Bernhard v. Bank of America*, 19 Cal. 2d 807 (1942). The whole thrust of this action is the same as the prior action—one huge conspiracy to prevent plaintiff from manufacturing his inventions. As Professor Currie has noted:

> "In a sense, the plaintiff who proceeds against one adversary and loses, only to try again against another, may be guilty of the same kind of trifling with the public interest against piecemeal litigation that gives rise to the rule against splitting a cause of action."

Currie, Mutuality of Collateral Estoppel: Limits on The *Bernhard* Doctrine, 9 Stan. L. Rev. 281, 301 (1957) (footnote omitted).

Plaintiff, no stranger to the federal courts (*see Railport v. General Electric Co.*, CCH 1974-2 TRADE CASES ¶ 75,313; *Railport v. General Motors Corp.* [1974-1 TRADE CASES ¶ 75,023], 366 F. Supp. 328 (E. D. Pa. 1973)—had a full and fair opportunity to litigate the same claims in his prior suit. He cannot avoid the results of that suit by merely suing the parent banks and embellishing on his theories.

Motion for summary judgment granted.

So Ordered.

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[1] It should be noted that in *Lawlor*, the Supreme Court held that *res judicata* could not apply since new antitrust violations were alleged and therefore the causes of action in both suits were not the same. 349 U. S. at 328. In addition, the doctrine of collateral estoppel was not involved in the *Lawlor* decision. Id. at 330 n. 20.

[2] Judge Knapp's decision was dated January 9, 1975. The plaintiff claims that he has filed a notice of appeal on February 6. However, there is no docket entry in the clerk's office to show such a filing. What is shown is a notice of motion to proceed on appeal without costs which plaintiff dates February 6, 1975 but which was stamped as filed with the clerk on February 25, 1975. That motion was denied by Judge Knapp on March 6, 1975. Attached to that motion was a statement of issues to be raised on appeal, but no notice of appeal.

[3] Plaintiff also alleges a violation of 15 U. S. C. § 13 in that new manufacturing companies are being discriminated against by the defendants. There is no indication in the complaint that defendants are engaged in *price* discrimination. A reading of the complaint shows that conspiracy to monopolize and refusal to deal form the basis of the complaint.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

- -x

ELI RAITPORT, :

Appellant, :

-against- : 75 Civ. 66
75-7433

COMMERCIAL BANKS LOCATED WITHIN THIS DISTRICT AS A CLASS et al, :

Appellees. :

- -x

AFFIDAVIT OF SERVICE

I, ELI RAITPORT, certify that a true and correct copy of this document entitled:

1. BRIEF FOR APPELLANT

2. Appellant-Contra affidavit against appellees motion to dismiss has been served each appellee in this captioned matter by mailing first class, postage prepaid to appellees attorneys on record to their offices as follows:

Shearman & Sterling
53 Wall Street
New York, N.Y. 10005

Eli Raitport

Eli Raitport
1807 Mower Street
Philadelphia, PA 19152

DATED: August 25, 1975

Sworn to and subscribed before me
this 25 day of Aug 19 75

Florence Berlin

Notary Public, Philadelphia, Philadelphia Co.
My Commission Expires November 10, 1975